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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 448

DAVID T. WILENTZ, J. H. THAYER MARTIN AND WALTER R. DARBY, ETC., *et al.*,

Appellants,

vs.

SOVEREIGN CAMP, WOODMEN OF THE WORLD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

REPLY BRIEF FOR APPELLANTS.

E. J. DIMOCK,
WILLIAM A. STEVENS,
Counsel for DAVID T. WILENTZ, J. H. THAYER MARTIN and WALTER R. DARBY, as and constituting the Municipal Finance Commission of the State of New Jersey, Appellants.

B. L. VISSCHER,
ARNOLD FRYE,
Of Counsel.

S. LEWIS DAVIS,
FRANK T. LLOYD,
Counsel for EARL KIRCHER, CONRAD WEBER and WILLIAM G. HIRSCH, members of the Board of Assessors of the Borough of Runnemede, New Jersey, and ALBERT W. SPENCER, Tax Collector of the Borough of Runnemede, New Jersey, Appellants.

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"The District Court did not err in enjoining the acceptance of bonds in payment of taxes and in its ruling as to the rights of appellee in that respect" 1

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Supreme Court of the United States,

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"The District Court did not err in enjoining the Municipal Finance Commission from functioning in the Borough and School District insofar as such functioning affects the appellee in the enforcement of its judgment, or in declaring the stay provisions of the Municipal Finance Commission Act unconstitutional", and

"The District Court did not err in enjoining the acceptance of bonds in payment of taxes and in its ruling as to the rights of appellee in that respect."

The plaintiff in its brief takes the position that the Act Concerning Municipal Finances and the Commission's activities, instead of being intended to eliminate the evils of the race of diligence and to realize for all of the creditors the greatest amount which an insolvent municipality can pay, were intended merely to forestall the collection of defaulted municipal bonds (p. 28). Plaintiff protests

that it is not seeking a preference over other creditors (p. 48).

If these claims are correct, they may well be determinative of this case. They therefore warrant a most careful consideration.

The plaintiff expresses its theory on pages 58-59 of the brief as follows:

> "So, we find in the operations of this Borough, the same vicious circle which was being followed in the cases above cited. The Borough under the protection of and with the active assistance of the Municipal Finance Commission, was withholding payment of any kind on the outstanding bonds, and resisting in court all efforts of creditors to obtain any payment thereon, the effect of such action being to depress the value, and, consequently, the market price of the securities of the borough and school district. This permitted taxpayers including officers of the Borough, to purchase bonds at these depressed prices for use in paying their taxes to the tune of $62,000 (R. 171); it also permitted the borough to purchase such bonds to the extent of $74,000 face amount at such depressed prices with funds on hand (R. 184) which should have been applied in *pro rata* payments on all the defaulted bonds of the borough, and prevented the accumulation of additional tax money for servicing the debt of the borough and school district."

The charges made are in substance these:

(1) The Municipal Finance Commission in the case of this municipality and others resisted not merely attempts of creditors to obtain preferences but also all efforts of creditors to obtain any payment on outstanding bonds.

(2) Consequently, the market price of the securities was depressed.

(3) This permitted taxpayers to purchase bonds at depressed prices for use in paying taxes, which, in turn, prevented the accumulation of additional tax money for servicing the debt.

(4) It permitted the borough to purchase bonds at depressed prices with funds which should have been applied in pro rata payments on all defaulted bonds of the borough.

(1)

As the first of these charges is the only one which merits any extended discussion, we will answer the others first and postpone its consideration to the section of this brief headed: "Does the Act forestall creditors as a whole or merely forestall a race of diligence? Is the plaintiff upholding the cause of the creditors as a whole or merely seeking a preference for itself?"

(2)

The claim that the market price of the securities was depressed is sufficiently answered by he determination below. The plaintiff in its bill of complaint alleges that as a result of the enactment of the Act Concerning Municipal Finances and the functioning of the Commission "a cloud of unenforceability has been publicly cast upon complainant's bonds, that the market value of complainant's bonds has been greatly depreciated * * *" (R. 15). The court below made the following finding of fact (R. 92):

> "11. Although the evidence produced by complainant relating to the effect of the legislation claimed to be unconstitutional upon the value of municipal securities is undisputed, it is not sufficient to establish the fact claimed by complainant that said legislation has publicly cast a cloud of unenforceability, or that by reason thereof the market value of complainant's bonds has been greatly depreciated."

No appeal was taken by the plaintiff.

(3)

Since thus the market price of the bonds was not depreciated, there is no substance to the charge that their price was deliberately depressed in order to make possible their purchase at depressed prices for use in paying taxes.

As bearing on the charge that the consent to the use of bonds in payment of taxes was a part of a plan to "forestall the collection of defaulted municipal bonds", we call attention to the fact that the Commission voluntarily discontinued consenting to bond settlements in all municipalities (R. 172).

In passing, we wish to correct plaintiff's statement on page 53 of appellee's brief that these consents were not actually discontinued in view of the fact that subsequent minutes of the Commission showed two approvals. This overlooks the facts that the resolution expressly saved pending cases (R. 60), that one of the two approvals referred to shows on its face that the case was pending on October 11, 1935, at the time of the passage of the resolution (R. 218), and that at the time of the hearing below all pending cases had been closed (R. 117).

Counsel for the plaintiff are in error in saying on page 54 of appellee's brief that the municipality has compromised taxes at amounts less than face value and then accepted at face value in payment of the compromised taxes bonds of the borough. The cases of bond settlements are all set out in the record, and in not one of them was the face value of the taxes reduced. The taxes and interest were paid in full by accepting bonds and coupons at face of principal and requiring cash for any odd amounts due above the round figures of the face of the bonds.

Nor was the charge proved insofar as plaintiff stated that acceptance of bonds in payment of taxes prevented the accumulation of additional tax money. On the contrary, the evidence tended to prove that the only cases where bonds were accepted in payment of taxes were those where the accumulated taxes exceeded the value of the property and that the property was unsalable at any price (Appellants' Br. pp. 51-52). Moreover, the rule that current taxes be paid in cash and the elimination of the arrearages which had robbed the owners of any incentive to pay current taxes, meant actual cash which would not otherwise have been paid.

Counsel make the point at pages 57-58 of appellee's brief that many of those who took advantage of the opportunity to make bond settlements must have been capable of paying the taxes on the properties in cash in full. The question is not whether they were capable of paying cash but whether, as a matter of good business, they would have paid cash. There is no personal obligation upon the owner of New Jersey real property to pay the taxes. If the taxes exceed the value of the property, as they did in these cases, the worst that can happen to the owner is to lose the record title to his worthless interest in the property.

(4)

Again, since bond prices were not depressed, even if there was a conspiracy "to forestall the collection of defaulted municipal bonds", the municipality was not enabled to purchase bonds at depressed prices.

More important, however, is the unfounded character of the charge that bonds were purchased with funds which should have been applied in pro rata payments on all the defaulted bonds of the borough. The fact is that the bonds purchased were assessment bonds paid for with trust assessment funds which could be used for no other purpose than to retire assessment bonds. The entire issue of assessment bonds was held by one bondholder so that no question of preference was involved (R. 170-171).

This disposes of all except the first of the claims urged in the appellee's brief, which will be discussed under the following heading:

Does the Act forestall creditors as a whole or merely forestall a race of diligence? Is the plaintiff upholding the cause of the creditors as a whole or merely seeking a preference for itself?

a. The litigation in which the Commission has taken part.

As proof of "the manner in which numerous delays and difficulties have been interposed in suits by creditors" by the Commission, the appellee's brief at page 10 refers the

court to the affidavit verifying the bill of complaint in support of the application for the interlocutory injunction (beginning R. 37). The parties stipulated below that this affidavit should be used only upon the application for the preliminary injunction (Stipulation, par. 22, R. 119), and that application has not been brought to this Court by appeal. Thus, material to combat it was not included in the record in this court. Nevertheless, we submit that this Court by an examination of the printed reports of the opinions rendered in the cases and an examination of the records in such of them as are included in the Record in this case, can reach an accurate determination as to whether it was the Commission or the group of plaintiffs, that was on the side of the creditors as a whole. The cases are (R. 37-41):

Township of North Bergen
Action at law.
Equity suit: *Barker* v. *North Bergen* (R. 155-161).

City of Asbury Park
Action at law.
Equity suit to restrain acceptance of bonds.
Mandamus proceeding: *Asbury Park* v. *United States ex rel. Albert G. Christmas, Nolan Harrigan, and Edwin H. Barker*, 78 F. 2d 1003; cert. den. 296 U. S. 624.

Township of Delaware
Action at law: *Delaware Township* v. *Central-Penn National Bank of Philadelphia*, 79 F. 2d 255.

Township of Chester
Action at law.
Mandamus proceeding: *United States ex rel. Norfolk & Western Railway Co.* v. *Township of Chester* (R. 187, 191).

Borough of Fort Lee
Action at law: *Barker* v. *Fort Lee.*
Equity suit to restrain acceptance of bonds.

While an examination of the reports and the Record here will indicate that in many of these cases counsel for the Commission appeared on behalf of the municipality (and, indeed, that the Commission was permitted to intervene in the *Runnemede, Chester* and *Asbury Park* mandamus proceedings by Judges Avis and Forman, two of the three who decided the application below), the only case in which counsel for the Commission raised the Act Concerning Municipal Finances against the obtaining of a judgment in the federal court was the *Township of Delaware* case, which was decided before the Circuit Court of Appeals in *Asbury Park* v. *Christmas* had applied the federal court's rule of discretion in these cases.

It is true that the Commission has hesitated to order distributions of cash by the municipalities which it supervises in the absence of either an agreement between all the bondholders which would fix their rights *inter sese* or a court decree which would have the same effect. This was explained by the statement of the Chairman of the Commission in the testimony in *Barker* v. *North Bergen* (R. 200), that the funds on hand came from several different sources. The Act Concerning Municipal Finances sets up a special proceeding for the determination of the rights of the creditors *inter sese* in a fund (Sec. 354, Appendix 109-110). In refutation of the claim on page 11 of appellee's brief that the municipalities under the supervision of the Commission have not made payments to creditors, we cite the testimony (R. 189) that in one municipality, the Township of North Bergen, over $3,000,000. was paid to creditors. The record of course does not show what has been accomplished since the suit was submitted below in October, 1936 in these six municipalities where the Commission is alleged by its activities in defending litigation to have "forestalled the collection of defaulted municipal bonds."

As an example of the affirmative use of the Act by the Commission for the benefit of the creditors as a whole, we cite *Rippel* v. *Asbury Park*, 118 N. J. Law 45, 190 Atl.

489, referred to at length beginning at page 24 of our principal brief.

Counsel for the plaintiff in their brief ignore *Pittsburg Steel Company* v. *Baltimore Equitable Society*, 226 U. S. 455, abstracted on page 41 of our principal brief, which holds that an omnibus remedy may constitutionally be substituted for an individual remedy.

Counsel for the plaintiff in their brief also ignore *Wright* v. *Vinton Branch*, 300 U. S. 440 (1937) and the provision contained in Section 355 of the Act (Appendix to our principal brief, p. 110), giving the New Jersey Supreme Court power to relax any of the statutory stays. We cannot assume that any suitor with an absolute right to the satisfaction of his claim would be refused a relaxation of the stay. We must assume that the New Jersey Supreme Court would refuse to relax the stay only under the same circumstances as the Circuit Court of Appeals in *Christmas* v. *Asbury Park* refused to lend the aid of the writ of mandamus to the plaintiffs.

b. The rule of Christmas v. Asbury Park.

The plaintiff here, however, attacks the decision in the *Asbury Park* case (Appellee's Br. p. 20). Counsel say that it is difficult to understand why the case was decided as it was because it was contrary to the rule of the cases cited by them and contrary to the decisions of other Circuit Courts of Appeal. They say that since we have gone beyond the printed transcript of the record in discussing the case, it is necessary for them to do likewise. We see no reason why counsel for the plaintiff need apologize for going to the record of that case to explain the opinion, nor do we feel guilty of any impropriety in having done so ourselves.

Replying first to the claim that the *Asbury Park* case is contrary to the rule of the cases cited by counsel, we find that not one of them stands for the proposition that the holder of a judgment on municipal bonds has an absolute right to a writ of mandamus.

The plaintiff, to establish its point, is forced to distinguish between the undoubted discretion of the federal court as to how many years the levy will be spread over when required by mandamus and the discretion as to whether at a given time any levy at all will be required by mandamus (See our principal brief, pp. 14, 37).

The plaintiff must concede the power of the court to direct by mandamus that a nominal amount only be inserted in the levy for one or more years and the balance in more substantial payments over succeeding years. This differs by only a hair's breadth from what was done in *Christmas* v. *Asbury Park*. Plaintiff also must concede that the usual mandamus proceeding is one addressed to the discretion of the court. (*U. S.* v. *Dern*, 289 U. S. 352, 359 (1933) and cases cited.) But here plaintiff takes another distinction and says that there is an exception in the case of a mandamus to compel the levy of a tax to pay a judgment on municipal bonds. When it is pointed out that even in such a mandamus there is the discretion as to the amount to be inserted in the tax levy, we are told that this discretion constitutes an exception to the exception.

We submit that the distinction between the discretion to spread the levy over various years and the discretion to postpone the levy for a year is a distinction without a difference and that it does not constitute the basis for an arguable question.

The inestimable value of the federal courts' discretionary power in mandamus as enunciated in *Asbury Park* v. *Christmas* is well illustrated in the subsequent history of that litigation given in *Rippel* v. *Asbury Park*, 118 N. J. Law 45, 190 Atl. 489 (*supra*), and abstracted on pages 24-27 of our principal brief. Where skillful judges have made use of this principle of judicial discretion in cooperation with state authorities or responsible creditors' committees, insurgent creditors have been given no more and no less than that to which they would have been entitled under fair plans approved by the court. Groups of creditors have been prevented from obtaining preferences over their

fellow creditors and their fellows have thus not been forced, from motives of self-preservation and irrespective of their natural inclinations, into the position of bringing proceedings for their individual benefit. We regret that the Circuit Court of Appeals for the Fifth Circuit in *United States ex rel. Metzger* v. *Vero Beach*, 90 F. 2d 70 (C. C. A. 5, 1937), cited on page 23 of appellee's brief, felt obliged to take the view that the discretion in mandamus was limited to spreading over a number of years a levy which would ultimately pay the creditors' judgment.

The case leaves the way open in that circuit for a determination that nothing should be paid on the judgment for, say, five years, but the determination must provide a schedule of payments which at some time in the future will exhaust the judgment. The rule of that case would deprive the court of the opportunity to feel its way from year to year and to base the amount of the assessment for each year on the immediate experience and prospects of the municipality. Instead it would require the court to act as a soothsayer and to prophesy once and for all the conditions which would obtain in each of the whole series of years until the execution had been completely satisfied.

The *Vero Beach* case was a substantial retrograde step in the progress of the forces of municipal righteousness against a creditor who seeks to capitalize his nuisance value.

We think that this Court can do a great service to the cause of orderly municipal refunding by expressly disapproving the *Vero Beach* case. That service would usefully supplement the service performed by the Circuit Court of Appeals for the Third Circuit in deciding *City of Asbury Park* v. *Christmas*, *supra*, 78 F. 2d 1003 (*cert.* den. 296 U. S. 624).

c. Does the plaintiff seek a preference or the same thing by another name?

Plaintiff labors through the New Jersey decisions and the decisions of the federal courts and of other states to show that there is a rule "first come, first served". On page 48 counsel say:

> "this creditor is not seeking a preference over other creditors, but is seeking a remedy open to all other creditors, namely, a special tax for the payment of Appellee's judgment which will secure to it only its *pro rata* share of the tax collections . . ."

Evidently counsel for the plaintiff use the word "preference" in a different sense from that in which we understand it. We had supposed that a creditor of an insolvent municipality who sought an order of the court under which his judgment would be paid where other creditors not diligent enough to have obtained a similar order of the court would go hungry, had obtained a preference.

Whatever that process may be called—"seeking a preference", "a race of diligence" or "seeking a remedy open to all other creditors, namely, a special tax for the payment of Appellee's judgment which will secure to it only its pro rata share of the tax collections"—that is the evil at which the stay and omnibus mandamus provisions of the Act Concerning Municipal Finances are aimed. It is to that too that the plaintiff claims a constitutional right.

Plaintiff's counsel cite on page 40 of appellee's brief *State ex rel. Buckwalter et al.* v. *City of Lakeland*, 112 Fla. 200, 150 So. 508 (1933). Since that case was decided, the dissenting opinion has become the law, for the Supreme Court of Florida now exercises a discretionary jurisdiction to stay peremptory writs of mandamus ordered on behalf of municipal judgment creditors. (*City of Sarasota* v. *State ex rel. Evans*, 127 Fla. 126, 172 So. 728 (1937).

The attack on *Vanderpoel* v. *Borough of Mt. Ephraim*, 111 N. J. Law 423, 168 Atl. 575, abstracted in our principal

brief at p. 37, is nothing but a play on words. We cited it for the modern doctrine that municipal creditors rank *pari passu* in the case of insolvency. Counsel for the plaintiff on page 50 of appellee's brief cite against it *Phelps* v. *Borough of Fort Lee*, 14 N. J. Misc. 895, 188 Atl. 689 (Supr. 1936), aff'd. *per curiam* 118 N. J. Law 181, 191 Atl. 836 (E. & A. 1937), where it was held that a creditor holding *tax anticipation notes* of a municipality under the supervision of the Municipal Finance Commission was entitled to a preference. We never meant to claim that in a case of municipal insolvency all class distinctions were abolished. All that we meant was that each member of each class of creditors ranked *pari passu* with the other members of that class. Incidentally, counsel criticize the holding in *Christmas* v. *Asbury Park*, saying (Appellee's Br. p. 22):

> "The language of the opinion was vague and inept. For instance, the Court could not have meant 'equal treatment' literally, for the rights of the various classes of municipal bondholders are not the same."

It may be that we were wrong in speaking of the *modern* doctrine that municipal creditors rank *pari passu* in the case of insolvency since it was enunciated as long ago as 1885 by Mr. Justice Field in *New Orleans Board of Liquidation* v. *Hart*, 118 U. S. 136 (1885). That was a case where a judgment creditor brought mandamus to compel the issuance to him of bonds provided for under a settlement agreement. The writ was opposed by the holders of bonds issued under a prior statute on the ground that the issuance of bonds to the relator would give the relator an interest in municipal property and revenues which had been pledged to secure their bonds under the prior statute. The United States Supreme Court referred to the fact that the relator's debt was in existence at the time when the municipal revenues and property were pledged for the payment of the objector's bonds, and held that under the law of Louisiana the relator was entitled to share ratably in the municipal property so

that the earlier statutes were void as to him. Mr. Justice Field's language on the subject was as follows (p. 147):

> "The objectionable feature in all the previous acts is their attempt to do partial justice, by discriminating between creditors equally meritorious, and applying the property and funds of the city to the payment of some of them in preference to others. In our opinion this cannot be done. All creditors at the time the property and funds were appropriated were entitled, for the payment of their respective claims, when legally established, to share *ratably* in the proceeds of the property and funds."

By saying that the doctrine of equal rank in case of insolvency was modern, we referred to the gradual clarification which has taken place in the distinction between those cases where a municipal creditor is entitled to full satisfaction irrespective of the claims of fellow creditors and those cases where all must share pro rata. Counsel for the plaintiff on page 51 of their brief classify the cases where the rule of "every man for himself" prevails as cases of an open fund, and the cases where creditors share pro rata as cases of a closed fund. The terminology adopted by the decisions classifies the cases upon the existence or nonexistence of an inexhaustible taxing power.

It was said that where general obligations of a solvent municipality were backed by an inexhaustible taxing power, no harm could come from permitting the diligent creditor to satisfy his claim in full, while his less zealous fellows reaped delay as the fruit of their inaction. On the other hand, where all must be satisfied from a single and limited source, they must be satisfied ratably. Examples of these two classes are to be found in the cases cited by plaintiff: *State ex rel. Gillespie* v. *Carlton*, 103 Fla. 810, 138 So. 612 (1931), and *Moran* v. *State ex rel. Montgomery*, 111 Fla. 429, 149 So. 477 (1933).

By hypothesis the general taxing power ceases to be inexhaustible when a municipality is insolvent, and wherever that situation has arisen the courts have applied the

pari passu rule. (*Morris, Mather & Co.* v. *Port of Astoria*, 141 Ore. 251 at 262 *et seq.*, 15 P. 2d 385 at 388 *et seq.* (1932), and discussion and cases cited; *Town of Columbus* v. *Barringer*, 85 F. 2d 908, at 911-12 (C. C. A. 4, 1936); *cf.* 13 N. Y. U. Law Q. Rev. 454 at 462-63, notes 79-81).

d. The Act did not affect existing priorities.

Plaintiff says in substance (Appellee's Br. p. 48) that it is not fighting a selfish battle but a battle for all the creditors in that it seeks to overturn the provisions of the Act Concerning Municipal Finances insofar as it has the effect of subjecting the claims of creditors to the prior lien of state, county and school taxes and municipal operating expenses. Counsel may be spared that trouble for the act has no such effect. That doctrine of the law of the State of New Jersey was in existence many years before the Act Concerning Municipal Finances was passed and before the plaintiff bought its bonds in 1930. On page 34 of appellee's brief, counsel by the sheer force of their italic type attempt to persuade this Court that it was because the Municipal Finance Commission was functioning in the Borough of Fort Lee that the New Jersey Supreme Court in *State ex rel. Phelps* v. *Borough of Fort Lee*, (quoted at Appendix E, p. 84 of Appellee's Brief) held that creditors holding a writ of mandamus came after state, county and school taxes and operating expenses.

We marvel at the ingenuity of the misinterpretation. The Act Concerning Municipal Finances contains not a word which would indicate the slightest intention to change the substantive rights of municipal creditors. Section 352 (at pages 107-109 of the Appendix to our principal brief) stays all mandamus proceedings except that it authorizes mandamus proceedings brought for the benefit of all creditors. The Act does not purport to create any new cause of action. If the creditors in individual actions before were not entitled to relief, then the statute does not entitle them to it when they sue in an omnibus action. There is one im-

portant exception to this in that the statute does away with the necessity for a judgment, and the Supreme Court is authorized "to afford to the holders collectively of any due and unpaid claims against a municipality any remedy which might be afforded under any other law to any individual creditor * * * as if there had been an entry of judgment in their favor * * * and all other conditions precedent to the affording of such relief by mandamus under such other law * * *."

Mandamus lies only to compel an existing legal duty (*Brownsville* v. *Loague*, 129 U. S. 493 (1889)). In *State ex rel. Phelps* v. *Fort Lee*, if it had not been the duty of the defendants under the provisions of the Execution Act and the Tax Law, or either of them, to assess and levy taxes for a single judgment creditor, they could not have been compelled to levy taxes for all the contract creditors. The only new right given by the Act was the right to a mandamus without a judgment. The thing required to be done by the mandamus was precisely the same as that which would have been required under the old law if a judgment had been obtained.

e. The judgment-creditor never had any priority.

The court in *State ex rel. Phelps* v. *Fort Lee* was merely applying, as though a judgment had been obtained, the old law as to the priority between the claims of private creditors, on the one hand, and state, county and school taxes and operating expenses, on the other. The subordinate position of the claims of private creditors is established in the following cases:

Gabler v. *Elizabeth*, 42 N. J. Law 79 (Supr. 1880);
State ex rel. Water Commissioners v. *Brewster*, 42 N. J. Law 125 (Supr. 1880);
Booth v. *Parnell*, 12 N. J. Misc. 413, 172 Atl. 50 (Supr. 1934);
Bayonne v. *State (Kingsland, Pros.)*, 41 N. J. Law 368 (E. & A. 1879);

Ross v. *Walton*, 63 N. J. Law 435, 44 Atl. 430 (Supr. 1889), aff'd. 67 N. J. Law 688, 52 Atl. 1132 (E. & A. 1902);

State ex rel. Coe v. *Englewood*, 68 N. J. Law 559, 53 Atl. 562 (Supr. 1902);

Tipping v. *Dougherty*, 11 N. J. Misc. 931, 169 Atl. 671 (Supr. 1933);

Piscataway Township v. *First National Bank of Dunellen*, 111 N. J. Law 412, 168 Atl. 757 (E. & A. 1933).

There is nothing extraordinary about a rule which subordinates debt service to operating expenses and to taxes payable to other governmental units. Subordination of debt service to operating expenses is the law of this Court. (*Clay County* v. *McAleer*, 115 U. S. 616 (1885)). The question of priority as between different taxing bodies arises in every case where different bodies' taxes are assessable on the same property. If the municipality collects all the taxes and pays them over to the school district, county and state, the rule might conceivably be that the municipality's debt service would come first and anything left over would go to the other governmental bodies. In that case the municipal bonds would be the prime investment and those of the other governmental bodies the less desirable investments. The rule adopted in New Jersey which makes the municipal debt service come last among the governmental bodies makes the municipal bonds the less desirable of the three. There is nothing inherently better in the one policy than in the other unless it can be said that the New Jersey policy is the wiser in that it avoids the natural propensity of a municipality, which has collected all that it needs, to show up on collecting the rest for other governmental bodies. By placing the municipality last on the list, the efforts of tax collection tend to be more aggressive.

In spite of *State ex rel. Phelps* v. *Fort Lee* it is the theory of the plaintiff that a sharp reversal of this public policy takes place where the debt service creditor has obtained a judgment. No attempt is made to assign any reason for

the alleged reversal of policy in such a case. We are simply told that the legislature has spoken and that the legislative fiat must prevail whether it makes for sense or nonsense, order or chaos. There is no reported decision in New Jersey which holds that a municipal judgment creditor is entitled to a special tax which gives him a position ahead of state, county and school taxes and operating expenses, and we know of no case of the levy of such a special tax.

So far as we know, the sole basis for the plaintiff's claim that it is entitled to an aliquot part of each dollar of taxes collected instead of sharing ratably with the other debt service creditors after prior charges is a claim that the statute by referring to payments to the officer serving the process by the "collector" means that the collections do not go into the general funds of the municipality before payment to the officer serving the process, and that they are therefore not subject to the usual prior charges (Appellee's brief, p. 35). This argument is answered by the very case which counsel cites in support of it, *Gabler* v. *Elizabeth*, 42 N. J. Law 79, 80 (*supra*), where the term "collector" as used in the old chapter on Executions of the Revised Statutes of 1877 was construed, on concession of counsel, to mean the officer "having the legal custody of and power to disburse the funds" of the corporation.

The Act of 1878 (Section 34 of the Execution Act, 2 Comp. Stats. 2255, quoted on p. 85 of Appendix B of our principal brief) refers back to the procedure under this old statute of 1877 and again uses the word "collector". Plaintiff's counsel assert that the Tax Act of 1918, on which they rely (Laws of 1918, Ch. 236, Sec. 505, Appendix B of our principal brief, pp. 87-88), is to be read with the Act of 1878, so that there too the word "collector" must be read as it was in the Act of 1877 to mean the officer "having the legal custody of and power to disburse the funds" of the municipality.

There is thus nothing in the language of the Execution and Tax Acts to indicate that a creditor who has gone through the procedure there outlined ranks ahead of state, county and school taxes and municipal operating expenses.

Indeed, the statute itself conclusively forbids the plaintiff's construction. The Tax Act of 1918 in Section 505, on which the plaintiff relies, provides that when the officer holding an execution has not been able to collect, he shall serve it upon the *county board of taxation*, and that the county board shall add the amount of the execution to the amounts which the taxing district certifies to it to be raised by taxation, and the amount of said execution shall thereupon also be raised by taxation and paid by the collector on or before the fifth day of June following, provided that if the execution gets to the county board too late to be included in its calculation of the tax rate for any given year, it shall be included in calculating the tax rate for the next year, "*unless the amount of such execution and interest shall have been included in the taxing ordinance or resolution with the other amounts to be raised by taxation in said taxing district*, or unless the execution shall have been satisfied otherwise." (Italics ours.)

The provisions of the 1918 statute which we have italicized in the above quotation show that the tax therein authorized is interchangeable with the ordinary items of the municipality's budget. If the county board receives the execution after it has fixed the rate for the year, then the amount is to be included by the board in the amount to be raised the next year "unless the amount of such execution and interest shall have been included *in the taxing ordinance or resolution with the other amounts* to be raised by taxation in said taxing district." (Italics ours.)

Thus, if, as claimed by counsel for the plaintiff, a judgment creditor had a right to a payment direct from the collector, he might lose it in a case where the execution was served on the county board after the tax rate was struck and the municipality then included it in the taxing ordinance for the next year. A construction of a statute which would make such important rights hang upon such an empty chance must be avoided. It is avoided when we realize that, as above demonstrated, the word "collector"

is not used in its technical sense and that whether moneys are collected as a result of an assessment required by the taxing ordinance or an assessment required by the county board of taxation, they go into a general fund and are subject to all prior public claims.

The most that the New Jersey statutes give the judgment creditor is the assurance of a place in the tax ordinance. Once he is in the tax ordinance, he takes his rank with other claims of the same character. If his judgment is for debt service, it ranks behind the claims for state, county and school taxes and behind the necessary expenditures of the municipality for its current operations.

This place in the tax ordinance is a very valuable privilege. It was to such a place in the tax ordinance that the New Jersey Supreme Court was referring to in *Gabler* v. *Elizabeth* (42 N. J. Law 79, *supra*), when it said as quoted on the appellee's brief at page 17 that the Act of 1878 "imparted life to what was before, without judicial aid first had to provide a fund with which to pay, little better than the mere shadow of a remedy." The opinion may be combed from title to conclusion without finding an indication that the court held that "the money received as a result of such tax never gets into the borough treasury and never becomes subject to any claims on the general tax revenues by the State, the County or the municipality," as intimated by plaintiff's counsel at page 35 of their brief.

In the *Gabler* case, a judgment creditor acted under the old chapter on Executions of the Revised Statutes of 1877, Section 9 of which provided (42 N. J. Law 79-80) for service of the execution upon the collector "who is hereby required to pay and satisfy the same out of the first moneys * * * which shall come into his hands." The judgment creditor followed this out but was met with the defense that Section 34 of the Execution Act of 1878 (which applies to municipalities instead of school districts but corresponds to Section 35 on which the plaintiff relies, see Appendix to our principal brief, p. 85), had repealed the old act and that

he ought to have served his execution on the assessors instead of on the "collector". He replied that the new act could not constitutionally have that effect because under the provisions of the old act he was entitled to the first moneys which should come into the hands of the collector and thus would come in ahead of state and county taxes, which were owing in large amount. The court replied that he had no such priority under the old act, and that, indeed, the new act increased his rights because under the old act no fund was appropriated for his payment, and under the city charter the treasurer was not permitted to make any payments except under appropriations, while the new act required the appropriation of a fund and thus authorized payment by the treasurer.

The court's words were (p. 86):

> "I have referred to these provisions of general law and of the city charter to show that the plaintiff was not invested with a remedy as broad and sweeping as he lays claim to; that he not only is not entitled to be paid out of the first moneys of the city that may come to the treasurer's hands from whatever source, but is entitled to demand payment of the treasurer only from some fund previously appropriated to pay his claim, or devoted to the payment of a class of claims to which his properly belongs, or from moneys unappropriated. The only fund of this kind which can be claimed as applicable to the payment of his execution is the contingent fund; but the evidence fails to show that the treasurer has in hand or is likely to receive any money belonging to this appropriation.
>
> "If my conclusions be correct, and this is the extent of his right against the respondent, it will be readily conceded, in view of the legislation referred to, that the act of 1878 took nothing of substantial value from him in impairment of his remedy, but, by its additional provisions, imparted substance and life to what was before, without judicial aid first had to provide a fund with which to pay, little better than the mere shadow of a remedy. It leaves him without ground to complain of the repeal of the earlier law."

If the court had believed that the new statute had not only created a new right to an appropriation for the plaintiff but had also given him a preference over state and county taxes which he had claimed under the old statute but which the court had held to be non-existent, the court certainly would have said so.

ANSWER TO APPELLEE'S POINT II:

"The District Court did not err in its rulings as to the statutes governing the enforcement of appellee's judgment."

Plaintiff's counsel here concede that the court below erred in omitting the Tax Act from the enumeration of acts governing the rights of the appellee, but say that the decree need not be reversed because the error is one of form and not of substance. The State of New Jersey does not feel at liberty to disregard a provision in a decree of a court of the United States on the ground that it is merely a matter of form. The Tax Law either is the source of none of the plaintiff's rights or it is the source of some of the plaintiff's rights or it is the source of all of the plaintiff's rights. The decree below says that it is the source of none of the plaintiff's rights. The plaintiff says that it is the source of some of the plaintiff's rights. We say that it is the source of all of the plaintiff's rights. In support of our position, we call attention to the fact that under the School Law, Section 237, (pp. 86-87 of our principal brief) the execution is to be served upon the assessors and the assessors are required to make the assessment. Under Section 505 of the Tax Law of 1918 (pp. 87-89), the execution is to be served upon the county board of taxation and the county board of taxation is required to make the assessment. Counsel for the plaintiff say that the provisions can stand together because the proviso in the Tax Law on page 88 says that the county board need not make the assessment if the assessors have already made it. The proviso so prescribes on only one contingency, i. e., if the execution shall not have been served on the county board before that board

shall have fixed the rate for the year. If, on the other hand, the execution is served on the county board before that board has fixed the rate for the year, then the county board has no choice but to include the amount of the execution in the amount to be raised by taxation even though the assessors have already included it in response to an execution served on them. This precludes the possibility that the old statute which required that the execution be served upon the assessors is still in existence. Otherwise, we would have a mandatory requirement for two assessments in the same amount, one made by the assessors and the other by the county board.

On the plaintiff's concession, the decree must be modified to include a recital of the Tax Law of 1918 (Laws of 1918, Ch. 236, Sec. 505) as one of the statutes fixing its rights, and should further be modified by eliminating Section 35 of the Execution Act and Section 237 of the School Law from that class and declaring that they were repealed by the Tax Law of 1918.

ANSWER TO APPELLEE'S POINT IV:

"The three-judge court had jurisdiction of the cause."

We regret that we did not make clear to counsel for the plaintiff our position on this branch of the case. We agree with them that jurisdiction of a three-judge court depends upon the case made out on the face of the papers. Our contention is that it appeared on the face of the complaint when read in the light of the applicable law of the State of New Jersey that no injunction could properly issue against state officers in the enforcement or execution of a state statute except in the case of the provision permitting consent by the Commission to bond settlements, and that in that case it appeared on the face of the complaint that the members of the Commission were colorably joined for the purpose of ousting the one-judge district court of jurisdiction. The actual proceedings thereafter were cited by us merely as illustrative of the impossibility which existed *ab initio* of making out a case for a three-judge court.

If this Court determines to remand the cause, we do not lieve that the course suggested by the plaintiff of a mand without a reversal is a proper one. *Healy* v. *Ratta*, 9 U. S. 701 (1933), which counsel cite on page 77 of pellee's brief, was decided before the practice suggested us had been developed in *Gully* v. *Interstate Natural Gas* ., 292 U. S. 16 (1934). While we have assigned error the appeal to the Circuit Court of Appeals to the effect at the three-judge court erred in not remitting the case a one-judge court so that the Circuit Court of Appeals uld be bound to reverse in any case where this Court had manded, we feel that the prosecution of the appeal in the rcuit Court of Appeals would involve needless delay and pense.

Respectfully submitted,

E. J. DIMOCK,
WILLIAM A. STEVENS,
Counsel for Davis T. Wilentz, J. H. Thayer Martin and Walter R. Darby, as and constituting the Municipal Finance Commission of the State of New Jersey, Appellants.

L. VISSCHER,
NOLD FRYE,
Of Counsel.

S. LEWIS DAVIS,
FRANK T. LLOYD,
Counsel for Earl Kircher, Conrad Weber, and William G. Hirsch, members of the Board of Assessors of the Borough of Runnemede, New Jersey, and Albert W. Spencer, Tax Collector of the Borough of Runnemede, New Jersey, Appellants.